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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Amy Breitzman,

10 Plaintiff,

11 v.

12 City of Phoenix, *et al.*,

13 Defendants.
14

No. CV-24-02480-PHX-JJT

ORDER

15 At issue is Plaintiff Amy Breitzman's Motion to Reinstate Defendant Diponzio or
16 Alternatively [for] Relief to Add Party (Doc. 19).

17 Federal Rule of Civil Procedure 4(e)(2) provides that a plaintiff can serve the
18 complaint and summons on an individual defendant located within the United States by
19 "(A) delivering a copy of the summons and of the complaint to the individual personally;
20 (B) leaving a copy of each at the individual's dwelling or usual place of abode with
21 someone of suitable age and discretion who resides there; or (C) delivering a copy of each
22 to an agent authorized by appointment or by law to receive service of process." Rule 4(e)(1)
23 provides that a plaintiff may also execute service of the complaint and summons by
24 following the applicable state law, and the state of Arizona's rules for service on a domestic
25 individual mirror the federal rules. Rule 4(l) provides that proof of service must be filed
26 with the court, unless service is waived.

27 Rule 4(d) provides the rules for a plaintiff to serve by waiver, and Rule 4(d)(4)
28 states that a plaintiff need not file proof of service if instead the plaintiff files a waiver.

1 Here, prior to Defendants' removal of this case from Arizona state court, Plaintiff—
2 who is represented by counsel—notified the state court that she had served two individual
3 Defendants, Sean Connolly and Nicholas Diponzio, by filing proof of service, and that
4 proof of service was defective on its face. Specifically, for example, the process server
5 stated in a Declaration of Service that she served Diponzio by serving and describing
6 Jessica Castro, deputy city clerk—an individual who is not authorized to accept service for
7 another individual. (Doc. 1-1 at 40.) Plaintiff thus failed to comply with the applicable rules
8 of service of process in either state or federal court.

9 In their Notice of Removal filed September 18, 2024—over four months ago—
10 Defendants pointed out the defective service of process on Defendants Diponzio and
11 Connolly. (Doc. 1 at 2.) On October 2, 2024, Defendants represented to the Court that
12 Plaintiff had agreed that Defendants need not file a motion to dismiss for insufficient
13 process under Rule 12(b)(4), but rather Plaintiff would request waivers of service. (Doc. 5.)
14 Indeed, Plaintiff filed a waiver for Connolly on October 16, 2024 (Doc. 7), obviating the
15 requirement for Plaintiff to file a valid Declaration of Service on Connolly, but Plaintiff
16 filed no waiver for Diponzio.

17 Under Rule 4(m), the service deadline for Diponzio was December 17, 2024—90
18 days after removal, when the Federal Rules of Civil Procedure took effect. Coincidentally,
19 Plaintiff filed a First Amended Complaint on that day, still naming Diponzio as Defendant,
20 but filed no Declaration of Service or waiver of service as to Diponzio.¹ Plaintiff filed the
21 First Amended Complaint outside the time permitted to file an amendment as a matter of
22 course under Rule 15(a)(1) but without obtaining the court's leave or the opposing party's
23 written consent under Rule 15(a)(2), as required. Plaintiff thus failed to comply with the
24 applicable rules in this lawsuit for a second time—by missing the deadline to serve
25 Diponzio—and a third time—by failing to comply with the pleading amendment rules.²

26 ¹ Of course, the filing of an amended complaint against a previously named
27 defendant does not reset the deadline by which a plaintiff must serve the defendant. Such
conduct would be an end-run around Rule 4(m).

28 ² Plaintiff also failed entirely to comply with Local Rule 15.1 in filing the amended
pleading.

1 On January 28, 2025—six weeks after the service deadline—the Court entered an
 2 Order (Doc. 17) dismissing Diponzio for Plaintiff’s failure to serve and a separate Order
 3 (Doc. 18) setting the Rule 16 case management conference as to Plaintiff’s claims against
 4 the remaining Defendants.³ Plaintiff has now filed a Motion asking the Court to “reinstate”
 5 Diponzio as Defendant for “good cause” because Diponzio’s counsel has now agreed to
 6 sign a waiver (which Plaintiff did not bother to attach or file to his Motion), or alternatively
 7 to “add” Diponzio back to the lawsuit as a party. (Doc. 19.) That is not how this works.

8 Rule 4(m) provides that the Court may extend the time for a plaintiff to serve a
 9 defendant if a plaintiff can show good cause for a failure to serve within the required period
 10 of time, but under Rule 6(b), such a request by a plaintiff must be filed *before* the deadline
 11 has passed, or the plaintiff must show her failure to make such a request before the deadline
 12 was on account of *excusable neglect*. *See Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 873
 13 (1990). Whether or not Plaintiff has now shown good cause for an extension to the service
 14 of process deadline under Rule 4(m),⁴ Plaintiff has made no effort to demonstrate to the
 15 Court that her failure to request an extension of time before the service deadline was due
 16 to excusable neglect, and the Court must therefore deny Plaintiff’s present Motion. Plaintiff
 17 has known about her failure to effectuate proper service on Diponzio at least since
 18 Defendants filed the Notice of Removal on September 18, 2024—over four months ago—
 19 and the service deadline passed on December 17, 2024—six weeks ago. Yet Plaintiff made
 20 no effort (until the Court dismissed Diponzio) to request an extension of time prior to or
 21 after the deadline. No excusable neglect for her tardiness is apparent.

22 The Federal Rules of Civil Procedure and the Local Rules of Practice for the District
 23 of Arizona set the deadlines for when parties must serve process and file pleadings,

24 _____
 25 ³ Plaintiff had more than adequate notice that she had not timely served Diponzio,
 26 including through Defendants’ Notice of Removal (Doc. 1) and Motion (Doc. 5) and the
 Court’s Order extending Diponzio’s time to answer the Complaint premised on the
 execution (and filing) of a waiver of service (Doc. 10).

27 ⁴ Plaintiff’s Motion requests an extension of time to serve Diponzio to February 7,
 28 2025—a seven-week extension to the original deadline. Because Plaintiff intends to serve
 by waiver, Diponzio has 60 more days to respond to the Amended Complaint, resulting in
 a months-long delay to this litigation were the Court to grant Plaintiff’s request.

1 motions, discovery and other materials. Any deviations from those rule-based prescriptions
2 come only from the Court's orders, and no party can unilaterally change that date without
3 the Court's awareness and consent. This is for practical reasons. When the Court is in the
4 dark as to any deadlines, case management becomes an impossibility, and a matter runs
5 serious risk of unnecessary delay, wasting or other inefficient use of the Court's time, and
6 undue expense to the parties.

7 Thus, rules-based deadlines, just like deadlines the Court sets in a scheduling order,
8 must be enforced by the Court. As the Ninth Circuit has explained:

9 In these days of heavy caseloads, trial courts in both the federal and state
10 systems routinely set schedules and establish deadlines to foster the efficient
11 treatment and resolution of cases. Those efforts will be successful only if the
12 deadlines are taken seriously by the parties, and the best way to encourage
13 that is to enforce the deadlines. Parties must understand that they will pay a
14 price for failure to comply strictly with scheduling and other orders, and that
failure to do so may properly support severe sanctions and exclusions of
evidence.

15 *Wong v. Regents of Univ. of Calif.*, 410 F.3d 1052, 060 (9th Cir. 2005). Underlying all of
16 these concerns is Federal Rule of Civil Procedure 1, which states, "These rules . . . should
17 be construed and administered to secure the just, speedy, and inexpensive determination of
18 every action and proceeding."

19 As an alternative to her request to "reinstate" Diponzio, Plaintiff asks that the Court
20 allow her to "add a party" to this litigation. In this instance, such a request is entirely
21 inappropriate as another attempt at an end-run around the Federal Rules of Civil Procedure.
22 Among other things, a plaintiff cannot simply "add back" a defendant the plaintiff named
23 in the original complaint and then failed to serve within the time provided in the Rules.
24 Such a result would render Rule 4(m) a nullity.


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IT IS THEREFORE ORDERED denying Plaintiff's Motion to Reinstate Defendant Diponzio or Alternatively [for] Relief to Add Party (Doc. 19).


Honorable John J. Tuchi
United States District Judge